(4)

No. 90-923

Supreme Court, U.S.
FILED
JAN 8 1991
JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1990

BILLY LAMB and
CARMON WILLIS - - - - Petitioners

versus

PHILIP MORRIS INCORPORATED
and
B.A.T INDUSTRIES PLC - - - Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT, B.A.T INDUSTRIES PLC

JAMES PARK, JR.
BROWN, TODD & HEYBURN
2700 Lexington Financial Center
Lexington, Kentucky 40507-1749
Telephone: (606) 231-0000

Counsel of Record for Respondent, B.A.T Industries PLC

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

LIST OF PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES

Respondent, B.A.T Industries PLC has no parent company. Its subsidiaries and affiliates (other than wholly owned subsidiaries) are:

Allied Dunbar Assurance PLC
B.A.T (Cyprus) Limited
Hellenobretanniki General Insurance SA
Eagle Star Gestora de Fondes de Pensiones SA
W D & H O Willis Holdings Limited
Nobleza-Piccardo SAICyF
Companhia Souza Cruz Industria e Commercio
Industrias Alimenticias Maguary SA
Tabasa-Tabaccos SA
Empresas CCT SA
Republic Tobacco Co
Cigarreria Morazan SA de CV
Tabacalera Nacional SA
Demerara Tobacco Company Limited
Tabacalera Hondurena SA
Tabacalera Nicaraguense SA
Eagle Star Insurance Company of Puerto Rico
Bangladesh Tobacco Company Limited
Tribeni Tissues Limited
PT B.A.T Indonesia
Malaysian Tobacco Company Berhad
Pakistan Tobacco Company Limited
British-American Tobacco Co. (Singapore) Limited
Ceylon Tobacco Company Limited
CTC Eagle Insurance Company Limited
Societe des Tabacs, Cigares et Cigarettes, J Bastos de L'Afrique Centrale SA
B.A.T Kenya Limited
The Monrovia Tobacco Corporation
B.A.T (Malawi) Limited

Nigerian Tobacco Company Limited
Aureol Tobacco Company Limited
South African Eagle Insurance Company Limited
Utico Holdings Limited
B.A.T Uganda 1984 Limited
B.A.T Zimbabwe Limited
Skandinavisk Holding AS
Tabacanaria SA
Imasco Limited
Aracruz Celulose SA
Polo Industria e Comercio Ltda
The West Indian Tobacco Company Limited
ITC Ltd.
Pioneer Tobacco Company Limited
East Africa Tobacco Company (UK) Limited
The Raleigh Investment Company Limited
N.V. Kolffs Offeetdrukkerij
New Zealand Holdings Limited
W D & H O Wills (New Zealand) Limited
Rokel Leaf Tobacco Development Company Limited
Barclay Look
Tobacco Processors Zimbabwe (Private) Limited
Bidwells and King Limited
Farmers & Settlers Cooperative Insurance Company of Australia Limited
Compagnie de Bruxelles Risques Divers
Centro Hispano de Aseguradores y Reaseguradores de La Salud SA
Eagle Star Vida Compania Espanole de Seguros y Reaseguros SA
Chasyr de Inversion Mobiliarca Sociedad Anonima, Sociedad de Inversion Mobiliana
Allied Dunbar, James Capel Limited
Immobilien—Kommanditgesellschaft Kuhlmann and Company Saarlend--Center Neun Kirchen

Immobilien—Kommanditgesellschaft Dr Anderegg and Company Lohr—Center Koblenz
Maguary Agricola SA
Tobacos Florida Ltda
Witcel Sacifia
VST Industries Limited
Arab-Malaysian Eagle Assurance Berhad
Sociedad Portuguesa de Celulose SARL (Soporcel)
Cigarros de Canarias SA
Empresas La Moderna SA de CV
Eagle Star France SA
Eagle Star Vie SA
SICAV Eagle Investissement
Cabinet Serre SARL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES INVOLVED

Public Law 95-213, sometimes known in its entirety as the Foreign Corrupt Practices Act of 1977, appears at pp. 18a-30a of the Appendix. Title IV of Public Law 97-290, commonly known as the Foreign Trade Antitrust Improvements Act of 1982, appears at p. 31a of the Appendix.

No. 90-923

SUPREME COURT OF THE UNITED STATES

October Term, 1990

BILLY LAMB and CARMON WILLIS
Petitioners
VS.
PHILIP MORRIS INCORPORATED
and
B.A.T INDUSTRIES PLC
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT, B.A.T INDUSTRIES PLC

STATEMENT OF THE CASE

This action was brought by two Central Kentucky burley tobacco farmers allegedly on behalf of a class of all Central Kentucky burley tobacco farmers similarly situated. The plaintiffs allege that defendant, B.A.T Industries PLC ("B.A.T Industries") and defendant, Philip Morris Incorporated ("Philip Morris"), somehow caused a decline in the market price for burley tobacco at Central Kentucky auction warehouses. Specifically, the plaintiffs allege that the conduct in Venezuela of B.A.T Industries' Venezuelan subsidiary, C.A. Cigarrera Bigott, Sucs.

("Bigott"), indirectly increased the "flood of undervalued imported tobacco into this country in competition with their product." Petition for Writ of Certiorari, p. 8. The plaintiffs complain only of increased competition from foreign tobacco growers. This action was purportedly brought pursuant to the Sherman Antitrust Act, 15 U.S.C. § 1, the Clayton Antitrust Act, 15 U.S.C. §§ 12 and 26, the Robinson-Patman Act, 15 U.S.C. § 13, and the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 and 78dd-2.

On June 28, 1989, the United States District Court for the Eastern District of Kentucky entered a judgment dismissing the complaint in its entirety against B.A.T Industries and Philip Morris on the ground that the action was barred by the act of state doctrine and that there was no implied private right of action under the Foreign Corrupt Practices Act. The plaintiffs appealed the judgment to the United States Court of Appeals for the Sixth Circuit. On September 28, 1990, the Court of Appeals rendered an opinion (reported as *Lamb* v. *Phillip Morris, Inc.*, 915 F.2d 1024 (6th Cir. 1990)), affirming the ruling of the District Court that there is no private right of action under the Foreign Corrupt Practices Act, but reversing and remanding the dismissal under the act of state doctrine on the basis of this Court's very recent opinion in *W.S. Kirkpatrick & Co., Inc.* v. *Environmental Tectonics Corp., International*, 493 U.S. ____, 110 S.Ct. 701, 107 L.Ed.2d 816 (1990). The plaintiffs did not seek a stay of the mandate, and the mandate of the Court of Appeals issued on October 22, 1990. On November 1, 1990, B.A.T Industries renewed its motion to dismiss the plaintiffs' antitrust claims on grounds other than the act of state doctrine. A status

conference has been set by the District Court for January 7, 1991, to address the issues in the litigation on remand.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEAL AS TO WHETHER THERE IS AN IMPLIED PRIVATE RIGHT OF ACTION UNDER THE FOREIGN CORRUPT PRACTICES ACT.

The plaintiffs claim that a "conflict in the circuits on this issue warrants an opinion by the Supreme Court resolving the question." Petition for Writ of Certiorari, p. 21. However, the plaintiffs admit that "[o]ther than the Sixth Circuit in the case at hand, no court has yet faced squarely the issue of whether private rights of action exist for parties injured by payments proscribed by the FCPA." Petition for Writ of Certiorari, p. 19. The Court of Appeals below noted that "[a]lthough the Foreign Corrupt Practices Act was enacted more than a decade ago, the question of whether an implied private right of action exists under the FCPA apparently is one of first impression at the federal appellate level." (footnotes omitted) Court of Appeals Opinion, 915 F.2d at 1027; Petitioners' Appendix at p. 14a.

Plaintiffs attempt to create a conflict in the circuits by citing at p. 20 of their Petition two cases which interpret Title II of Public Law 95-213 — *Indiana National Corp.* v. *Rich*, 712 F.2d 1180, 1184 (7th Cir. 1983), and *Jacobs* v. *Pabst Brewing Co.*, 549 F. Supp. 1050, 1062 (D. Del. 1982). Public Law 95-213, sometimes known in its entirety as the Foreign Corrupt Practices Act of 1977, contains two titles. Section 101 of Title I provides that Title I may be cited as

the "Foreign Corrupt Practices Act of 1977". Section 201 of Title II provides that Title II may be cited as the "Domestic and Foreign Investment Improved Disclosure Act of 1977". Title I is a penal statute which makes the bribery of foreign governmental officials a crime. Title II amends Section 13(d)(1) of the Securities Exchange Act of 1934 (commonly known as the Williams Act), and adds a new Section 13(g) to that Act. (Appendix, pp. 18a-30a.)

Because the cited cases discuss Title II and not Title I of Public Law 95-213, they are completely irrelevant to the issues presented in this case, which calls for an interpretation of Title I of that Act. The *Jacobs* case does, however, succinctly describe the difference in the analysis for determining whether there exists an implied private right of action under a new statute and an existing statute:

> If the legislation is new, the question is whether Congress intended to *create a remedy* to supplement any express enforcement provision. If Congress, however, is amending a statute which has already been held by the judiciary to include a private cause of action, the inquiry is different — the question is whether Congress intended to *preserve the preexisting remedy.* (emphasis supplied; footnote omitted)

Jacobs, supra, at 1056.

The courts have consistently held that a private right of action exists under the Williams Act. The only question, therefore, before the courts in the *Jacobs* and *Indiana National* cases was whether Congress had expressed an intent to preserve the preexisting remedy. Both courts held that Congress was aware of the preexisting remedy and had done nothing to express its intent that the remedy be abrogated. These cases have nothing to do with the entirely different analysis required in any case involving

application of Title I of the Act, which creates a new federal crime.

The plaintiffs contrast the *Jacobs* and *Indiana National* opinions with those in *McLean* v. *International Harvester Co.*, 817 F.2d 1214 (5th Cir. 1987), *Lewis* v. *Sporck*, 612 F. Supp. 1316 (N.D. Cal. 1985), *Eisenberger* v. *Spectex Industries, Inc.*, 644 F. Supp. 48 (E.D. N.Y. 1986), and *Shields* v. *Erickson*, 710 F. Supp. 686 (N.D. Ill. 1989), in an attempt to create a conflict in the circuits. Three of these cases, *Lewis, Eisenberger*, and *Shields*, construed Section 102 of Title I of the Act, which created a new Section 13(b)(2) of the Securities Exchange Act of 1934, codified as 15 U.S.C. § 78m(b)(2). The courts held that no private right of action is implied in Section 102. *Lewis* specifically held that the analysis in construing the Foreign Corrupt Practices Act (Title I) is different from that for cases involving Title II of Public Law 95-213, such as *Jacobs* and *Indiana National:*

> Even accepting the analysis by the *Jacobs* and *Rich* courts of the legal climate of Section 13(d), I believe that the opposite conclusion is required with respect to Section 13(b)(2). The crucial distinction is the extent to which the FCPA affected the two different statutes. The FCPA only slightly modified the statute which was Section 13(d), a statute that several courts had previously found to contain a private remedy. *See Jacobs* v. *Pabst Brewing Company*, 549 F. Supp. at 1059 n. 13. On the other hand, Section 13(b)(2), as enacted by the FCPA, was the archetypical "new" statute in *Merrill Lynch* terms; it was unique among the federal securities laws in both wording and purpose. (footnote omitted)

Lewis, supra, at 1328-29.

In the *McLean* case, the Court was called upon to decide whether the so-called Eckhardt Amendment to the FCPA (§ 103(b), Title I) creates a private right of action. The Court ruled that there was no implied private right of action. This is not inconsistent with the *Indiana National* and *Jacobs* cases, because *McLean* construed Title I of Public Law 95-213, not Title II. *McLean* is also completely consistent with the Court of Appeals Opinion in this case which construed § 103(a) and § 104(a) of Title I.

The cases construing Public Law 95-213 are entirely consistent with one another, and two principles of law relating to Public Law 95-213 may be gleaned from a review of these cases:

1. The courts have refused to imply a private right of action arising under any provisions of the FCPA (Title I) which constituted new legislation enacted after the decision in *Cort* v. *Ash*, 422 U.S. 66 (1975), because there was insufficient evidence of Congressional intent to create a new private cause of action.

2. The courts have retained the implied private right of action arising under those statutes modified by Title II because there was no evidence that Congress intended to eliminate the private cause of action recognized by prior court decisions.

These two principles derived from the cited case law are also consistent with this Court's recent pronouncements on the implication of private rights of action under federal statutes. See *Thompson* v. *Thompson*, 484 U.S. 174, 179 (1988); *Karahalios* v. *Nat. Fed'n of Fed. Employees, Local 1263*, 489 U.S. 527, ____, 109 S.Ct. 1282, 1286-87, 103 L.Ed. 2d 539, 549 (1989).

At p. 19 of their Petition, the plaintiffs also cite three federal cases which they claim "have permitted a defendant to raise the defense of violation of the FCPA by a plaintiff as an affirmative defense denying recovery as a violation of public policy." For this proposition, they cite *Sedco International, Inc. S.A.* v. *Cory*, 683 F.2d 1201, 1210 (8th Cir. 1982); *Instituto Nacional* v. *Continental Illinois National Bank*, 576 F. Supp. 985, 990 (N.D. Ill. 1983); and *Northrop Corp.* v. *Triad Financial Establishment*, 593 F. Supp. 928 (C.D. Cal. 1984). These cases have nothing to do with the implication of a private right of action under the FCPA. They merely suggest, in accordance with black letter contract law, that acts which violate the penal provisions of the law are against public policy, and therefore, contracts which contemplate the performance of such acts may be unenforceable.

The plaintiffs have failed to demonstrate a conflict among the circuits within the scope of Rule 10.1(a) of the rules of this Court.

II.

THE DECISION OF THE COURT OF APPEALS THAT NO PRIVATE RIGHT OF ACTION IS IMPLIED UNDER THE FOREIGN CORRUPT PRACTICES ACT IS CORRECT AND CONSISTENT WITH DECISIONS OF THIS COURT.

The Court of Appeals correctly ruled that the question of whether a private right of action exists under the FCPA must be determined by considering the four factors set out in *Cort* v. *Ash*, *supra*, at 78. The Court enunciated the four factors as follows:

> (1) whether the plaintiffs are among "the class for whose *especial* benefit" the statute was enacted;

(2) whether the legislative history suggests congressional intent to prescribe or proscribe a private cause of action;

(3) whether "implying such a remedy for the plaintiff would be 'consistent with the underlying purposes of the legislative scheme' "; and

(4) whether the cause of action is " 'one traditionally relegated to state law, in an area basically the concern of States, so that it would be inappropriate to infer a cause of action.' "

Court of Appeals Opinion, 915 F.2d at 1028; Petitioners' Appendix at p. 16a.

The Court of Appeals analyzed each of the four factors as follows:

1. "Especial Beneficiaries."

The Court of Appeals correctly noted that "the FCPA was primarily designed to protect the integrity of American foreign policy and domestic markets, rather than to prevent the use of foreign resources to reduce production costs. The plaintiffs, as competitors of foreign tobacco growers and suppliers of the defendants, cannot claim the status of intended beneficiaries of the congressional enactment under scrutiny." Court of Appeals Opinion, 915 F.2d at 1029; Petitioners' Appendix at p. 19a.

In order to show any kind of an injury from the alleged actions of the defendants in Venezuela, the plaintiffs must prove every link in a long chain reaction: they must prove that B.A.T Industries caused its Venezuelan subsidiary, Bigott, to make a donation to the Venezuelan Children's Foundation, a non-governmental organization; that the donation somehow passed through that Foundation to some official of the Venezuelan government (a fact the plaintiffs

have not even alleged in their complaint); that the bribed official of the Venezuelan government somehow froze or lowered the prices Venezuelan burley tobacco farmers received for their tobacco; and that the lowering of the price of burley tobacco in Venezuela somehow lowered the price of burley tobacco in Central Kentucky.[1] In fact, the plaintiffs can prove none of these elements. No payments were made to foreign officials. (Appendix, p. 16a.) Bigott imported no American tobacco. All the burley tobacco purchased by Bigott in Venezuela was processed in Venezuela, and Bigott exported no unmanufactured burley tobacco to the United States. (Rombaut Affidavit, Appendix, pp. 38a-40a, ¶¶ 6 and 9.) Bigott did not add to the nonexistent "flood" of imported burley tobacco of which the plaintiffs complain. The plaintiffs did not compete with Bigott in either the purchase or sale of burley tobacco. Those suffering such an indirect injury, if they have been injured at all,

---

[1]The last link in the chain—the effect of the lowering of the price of Venezuelan tobacco on the Central Kentucky markets—may be the weakest in the chain. Despite the claim of the plaintiffs that there was a "flood" of Venezuelan tobacco being dumped on the domestic tobacco market, the Venezuelan burley tobacco did not even amount to a trickle. During the period of 1977 to 1981, the average yearly amount of all burley tobacco imported by the United States from Venezuela (37 metric tons; $33,000.00 in value) represented a mere 0.39% by volume and 0.24% by value of total burley tobacco imports, and an even more insignificant 0.01% by volume and 0.004% by value of U.S. burley tobacco production in the eight states producing burley tobacco. During 1982, 1983, and 1984, years for which the plaintiffs have complained, *no* Venezuelan burley tobacco was imported into the United States. See United States Department of Agriculture, *Tobacco: World Tobacco Situation*, FT 3-85 (March, 1985), Appendix at p. 43a; Kentucky Department of Agriculture, *Kentucky Tobacco Market: '83-'84 Report and Review, '84-'85 Marketing Preview*, Appendix at p. 44a.

by acts committed in foreign countries, cannot be the "especial beneficiaries" of the Foreign Corrupt Practices Act.[2]

2. Congressional Intent Concerning Private Rights of Action.

The Court of Appeals correctly ruled that there is no evidence whatsoever of any congressional intent to create a private right of action under the Foreign Corrupt Practices Act.

As the Court noted, the passage of the Foreign Corrupt Practices Act was achieved only after a hard-fought battle, during the course of which many compromises were effected:

> The availability of a private right of action apparently was never resolved (or perhaps even raised) at the conference that ultimately produced the compromise bill passed by both houses and signed into law; neither the FCPA as enacted nor the conference report mentions such a cause of action. . . . Because the conference report accompanying the final legislative compromise makes no mention of a private right of action, we infer that Congress intended no such result. (citations omitted)

Court of Appeals Opinion, 915 F.2d at 1029; Petitioners' Appendix at pp. 20a-21a.[3]

---

[2]The indirectness of the purported injury to the plaintiffs is so great that one of the grounds upon which B.A.T Industries has moved the District Court on remand to dismiss the complaint in its entirety is that the alleged injuries are so remote that they do not rise to the level of cognizable antitrust injuries and, therefore, the plaintiffs have no standing to bring this action, and the District Court should dismiss it for lack of subject matter jurisdiction.

[3]The conference committee produced a compromise bill due to differences between the House and Senate bills. The Senate Report contained no mention of an implied private right of action. *Lewis, supra*, at 1330.

3. Consistency With the Legislative Scheme.

The Court below properly found that "[r]ecognition of the plaintiffs' proposed private right of action, in our view, would directly contravene the carefully tailored FCPA scheme presently in place." Court of Appeals Opinion, 915 F.2d at 1029; Petitioners' Appendix at p. 23a. The Court below recognized that Congress had put in place specific means for the enforcement of the FCPA, and that these means did not include a private right of action.

> Because this legislative action clearly evinces a preference for compliance in lieu of prosecution, the introduction of private plaintiffs, interested solely in post-violation enforcement, rather than pre-violation compliance, most assuredly would hinder congressional efforts to protect companies and their employees concerned about FCPA liability.

Court of Appeals Opinion, 915 F.2d at 1029-1030; Petitioners' Appendix at p. 23a.

4. Alternative Avenues of Redress.

The Court below correctly ruled that, even though no state statutes prohibit the bribery of foreign officials, the plaintiffs have an adequate remedy at law through the private rights of action contained in the United States antitrust laws. In fact, the plaintiffs are even now availing themselves of these remedies through their prosecution of this action on remand in District Court.

The plaintiffs cannot show that the decision below conflicts with decisions of this Court. Rule 10.1(c) of the Rules of the Supreme Court.

III.

THE QUESTION ASSERTED BY PETITIONERS CONCERNING A PRIVATE RIGHT OF ACTION UNDER THE FOREIGN CORRUPT PRACTICES ACT IS NOT PROPERLY PRESENTED BY THE FACTS OF THIS CASE.

As to B.A.T Industries, this case can be finally adjudicated without deciding the issue of whether a private right of action is implied by Title I of Public Law 95-213, because that statute does not apply to B.A.T Industries. B.A.T Industries fits into neither of the categories of companies regulated by the FCPA—it is neither an issuer nor a domestic concern. B.A.T Industries is a public limited company organized under the Companies Act of the United Kingdom, with its principal office in London, England. B.A.T Industries has not bought or sold tobacco in the United States. (MacInnes Affidavit, Appendix, pp. 34a-35a, ¶ 3.)

Section 103(a) of Title I created a new Section 30a of the Securities Exchange Act of 1934 (the "1934 Act"), 15 U.S.C. § 78dd-1. Under this section, it is unlawful for any issuer of securities registered pursuant to Section 12 of the 1934 Act (15 U.S.C. § 78l), or which is required to file reports pursuant to Section 15(d) of the 1934 Act (15 U.S.C. § 78o) to make corrupt payments to foreign officials in order to obtain or retain business. There has been no allegation that B.A.T Industries is either an issuer of securities registered under Section 12 or an issuer required to make reports under Section 15(d) of the 1934 Act, and it is neither. (Appendix, pp. 1a-12a.)

Under Section 12(g)(3) of the 1934 Act, the Commission may exempt securities of a foreign issuer from the require-

ments of registration (15 U.S.C. § 78l(g)(3)). Pursuant to this authority, the Commission has provided an information-supplying exemption to foreign issuers that furnish the Commission with the same information required by the country of the issuer's domicile. 17 C.F.R. § 240.12g3-2 (b)(1). B.A.T Industries has utilized the information-supplying exemption to obtain exemption from registration under Section 12. List of Foreign Issuers Which Have Submitted Information Required by Exemption Relating to Certain Foreign Securities, 3 Fed. Sec. L. Rep. (CCH) ¶ 23,317. B.A.T Industries is not an issuer of securities registered under Section 12 of the 1934 Act subject to the proscriptions of Section 103(a) of the FCPA, 15 U.S.C. § 78dd-1.

The reporting requirements of Section 15(d) of the 1934 Act (15 U.S.C. § 78o(d)) apply only to issuers of securities registered under the Securities Act of 1933 (the "1933 Act"), 15 U.S.C. §§ 77a-77bbb. No securities issued by B.A.T Industries are registered under the 1933 Act. (MacInnes Affidavit, Appendix, p. 36a, ¶ 5.)

Under Section 104(a) of the FCPA, it is unlawful for any "domestic concern" to make corrupt payments to foreign officials in order to obtain or retain business. 15 U.S.C. § 78dd-2. A "domestic concern" is defined to include only those corporations which have their principal place of business in the United States, or which are organized under the laws of a state or territory of the United States. 15 U.S.C. § 78dd-2(d)(1). Neither B.A.T Industries nor Bigott is a domestic concern. B.A.T Industries is a public limited company organized under the Companies Act of the United Kingdom, with its principal office and place of business in London, England. Bigott, is a Venezuelan corporation. In enacting the FCPA, Congress was

concerned with the conduct abroad of American companies. The FCPA does not apply to the conduct of foreign corporations in foreign countries. The FCPA does not confer subject matter jurisdiction over the claim of Lamb and Willis against B.A.T Industries.

IV.

THERE IS NO ADVERSE RULING FROM THE COURT OF APPEALS CONCERNING THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT OF 1982 FROM WHICH THE PETITIONERS MAY SEEK REVIEW.

Plaintiffs' second question presented is framed as follows:

> 2. Does the Foreign Trade Antitrust Improvements Act of 1982 as codified at 15 U.S.C. § 6(a) (1982), make more stringent the jurisdictional standard for an antitrust complaint alleging a conspiracy to fix prices of *im*ported [sic] commerce?

Petition for Writ of Certiorari, p.i.

While the question as framed by plaintiffs may be interesting in an academic sense, it has never been considered by either the District Court or the Court of Appeals. There is no adverse ruling on this issue from which plaintiffs could appeal. In fact, the plaintiffs were successful on their appeal relating to dismissal of their antitrust claims in the District Court, and the plaintiffs cannot point to any error of the Court of Appeals in remanding the antitrust issues to the District Court. This Court should decline to consider a question in a petition for writ of certiorari which has not been considered by a lower court. *Patrick* v. *Burget*, 486 U.S. 94, 100 n.5 (1988).

The slate is clean in District Court on this matter, and the plaintiffs are free to urge the District Court to adopt any interpretation of the Foreign Trade Antitrust Improvements Act ("FTAIA") they choose. The plaintiffs have, in effect, requested this Court to give them and the District Court an advisory opinion on the effect of the FTAIA on this case, without allowing the District Court to first make any findings as to this issue and related issues.[4] The District Court, in its Opinion and Order, addressed only the Foreign Corrupt Practices Act issue and the issue of the act of state doctrine:

> However, inasmuch as the court has determined that this action is barred by the act of state doctrine and the Foreign Corrupt Practices Act of 1977, the court need not address this issue [the applicability of the FTAIA] or any other remaining issues.

District Court Opinion and Order, p. 16; Petitioners' Appendix at p. 24b.

---

[4]B.A.T Industries, in its renewed motion to dismiss filed November 1, 1990, requested that the District Court dismiss the complaint on the following grounds:

a. This Court lacks subject matter jurisdiction over the claims alleged by the plaintiffs.

b. The plaintiffs lack standing to bring the claims asserted, in that they have suffered no antitrust injury.

c. The claims in the Complaint are barred by the act of state doctrine and the doctrine of petitioning immunity.

d. This Court lacks personal jurisdiction over B.A.T Industries.

e. This Court lacks venue over this action.

f. Service of process on B.A.T Industries was defective.

Renewed Motion to Dismiss, ¶ 3.

The Court of Appeals Opinion specifically remands these issues to the District Court:

> In rejecting the district court's invocation of the act of state doctrine, we do not pass judgment on whether the plaintiffs have set forth viable antitrust claims. The defendants interposed several alternative justifications for dismissal that the district court has not yet addressed. The defendants are free to raise these arguments to support a subsequent motion for dismissal or summary judgment following remand.

Court of Appeals Opinion, 915 F.2d at 1027, n.7; Petitioners' Appendix at p. 13a, n.7.

Because neither the Court of Appeals nor the District Court has addressed the issue of the applicability of the FTAIA to this case, and because no adverse ruling concerning the FTAIA exists at this point, it would be premature for this Court to give a speculative advisory opinion on the Act's applicability, particularly given the serious nature of the Motions to Dismiss which are now pending in the District Court.[5] Even if FTAIA issues had been

---

[5]Honorable Scott Reed, the District Judge who entered the Memorandum Opinion and Order, noted at a hearing at which he stayed all discovery pending a decision on the Motions to Dismiss:

> The matter of jurisdiction concerns me and particularly that portion of the showing so far as goes to subject matter jurisdiction. . . . And, Mr. Lackey, I can't make any hard commitments, but I am going to make every attempt to move this Motion to Dismiss up and address myself to it as reasonably prompt as human frailty [sic] will permit me, and I can't give you any more exact proposition, but you are entitled to a decision. And certainly I think that this matter of subject matter jurisdiction is a critical point at which to seriously examine this lawsuit now.

Transcript of Hearing, p. 25, reprinted in Appendix, p. 32a.

considered and decided by the Court of Appeals, the issue as stated by the plaintiffs is not factually correct. The plaintiffs seek a construction of the FTAIA as applied to import commerce. The transaction with the Venezuelan Children's Foundation did not involve the import trade or import commerce of the United States. The Venezuelan transaction involved the purchase of tobacco in Venezuela from Venezuelan tobacco growers for use in Venezuela. B.A.T Industries exported no Venezuelan tobacco to the United States. (Rombaut Affidavit, Appendix, pp. 39a-40a, ¶¶ 6 and 9.)

CONCLUSION

The plaintiffs have not shown any reason that this Court should review the decision of the Court of Appeals below. Therefore, B.A.T Industries respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

James Park, Jr.
Brown, Todd & Heyburn
2700 Lexington Financial Center
Lexington, Kentucky 40507-1749
Telephone: (606) 231-0000

Counsel of Record for Respondent, B.A.T Industries PLC

APPENDIX

TABLE OF CONTENTS

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF KENTUCKY
AT LEXINGTON

Civil Action Number 85-340

BILLY LAMB, CARMON WILLIS,
and KATHERINE GRADDY
on behalf of themselves and as representatives of the class defined herein, - - - *Plaintiff*,

v.

PHILLIP MORRIS, INCORPORATED
and B.A.T. INDUSTRIES PLC., - - - *Defendants.*

COMPLAINT—Filed August 21, 1985

The plaintiffs, Billy Lamb, Carmon Willis and Katherine Graddy, by their attorney, bring this civil action against the above-named Defendants, and each of them, and demanding trial by jury, and complain and allege as follows:

1. This action arises under statutes of the United States designed to protect trade and commerce against restraints and monopolies, being more particularly the Sherman Antitrust Act of July 2, 1980, as amended, (15 USC § 1 et seq.), the Clayton Act, as amended, (15 USC § 12 et seq.), and the Robinson-Patman Act, as amended, (15 USC § 13 et seq.). Jurisdiction and venue are vested in this court by section 1337 of Title 28 of the United States Code, and sections, 15, 22, 26 and 31 of Title 15 of the United States Code.

2. Plaintiffs, Billy Lamb, Carmon Willis, and Katherine Graddy, bring this action on behalf of themselves and all other sellers of burley tobacco grown within the counties of Scott, Madison, Jessamine, Bourbon, Fayette, Mercer, Clark and Woodford in the State of Kentucky, who consummated such sales of burley tobacco within the past six (6) years.

3. This action is brought in accordance with Rule 23 (a) and (b) of the Federal Rules of Civil Procedure. The class represented by the named Plaintiffs in this action consists of all persons who sold burley tobacco grown within the counties of Scott, Madison, Jessamine, Bourbon, Fayette, Mercer, Clark, and Woodford in the State of Kentucky, who consummated such sales of burley tobacco within the past six (6) years. Since the two (2) Defendants herein acted uniformly in connection with the named Plaintiffs and the class they represent, there exist questions of law and fact which are common to all members of the class, and which predominate over questions of law and fact which affect only individual members of the class. The impact of the offenses committed by both the Defendants is common to all the Plaintiffs, and therefore their claims are typical of the claims of their class. Since the named plaintiffs have interests in this action which are coincident with and not adverse to the class they represent, and since the named Plaintiffs individually have a substantial financial interest in this action, the named Plaintiffs will adequately protect the interest of the class they represent.

Moreover, the prosecution of separate actions by individual members of the Plaintiffs' class would create a risk of: (1) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the Defendants, or either of them, or (2) adjudications with respect to individual members of the class which would as a practical

matter be dispositive of the interests of the other members not parties to the adjudications or would substantially impair or impede their ability to protect their interests.

Finally, it is believed that the Defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate the requested final injunctive relief or corresponding declaratory relief with respect to all the class represented by the Plaintiffs.

4. By maintaining this action as a class action, savings in time, effort and expense will be achieved by both the courts and the parties to this action. One of the advantages of maintaining this action as a class action is that persons who are members of the class, and who have claims which might not otherwise warrant individual actions, will be provided with a method for the redress of their claims. Additionally, the maintenance of this action as a class action will eliminate the possibility of repetitious litigation which might result in the establishment of incompatible standards of conduct for the Defendants. Thus, a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

5. The Plaintiffs, Billy Lamb, Carmon Willis, and Katherine Graddy, are, and at all times relevant to this action were, resident citizens of Madison County or Woodford County, Kentucky.

6. The Plaintiffs are, or at all times relevant to this action were, growers of burley tobacco in Madison County or Woodford County, Kentucky.

7. The Defendants are large, integrated, multinational corporations engaged in the business, *inter alia*, of brokering, purchasing, selling, processing and producing tobacco, and conduct some, or all, of such enterprises within the counties of Scott, Madison, Jessamine, Fayette, Clark, Bourbon, Mercer, and Woodford in the State of Kentucky. The said companies require burley tobacco like that pro-

duced by the Plaintiffs and others of the class they represent to operate their business, and routinely through, or for, their agents, employees or assigns purchase such tobacco at Central Kentucky tobacco markets where Plaintiffs and their class sell their tobacco.

8. In addition to the purchase of burley tobacco produced in the United States of America, the Defendants routinely purchase tobacco fungible with American tobacco from foreign producers in such countries as Venezuela, Argentina, Brazil, Mexico, Nicaragua, Costa Rica, and other countries for resale, for brokering to other companies, and for use in the production of cigarettes and other tobacco products. The tobacco produced in the other countries patronized by the Defendants is sold in competition with the tobacco produced by the named Plaintiffs and the other members of the class which they represent, such that when the Defendants supply their need for tobacco from foreign producers they require less tobacco produced by American or domestic producers including that produced by the Plaintiffs and their class, and such that when the Defendants purchase tobacco from foreign producers at a price below the price of American or domestically produced tobacco, the price of American or domestically produced tobacco is affected adversely to the interests of the Plaintiffs and their class.

9. That on or about May 14, 1982, "C.A. Tabacalera National (CATANA)," a wholly owned subsidiary of Defendant, Phillip Morris, Incorporated, acting at the benefit, instruction, and behest of Defendant, Phillip Morris, Incorporated, and "C.A. Cigarrera Bigott, SUCS.", a wholly owned subsidiary of Defendant, B.A.T. Industries PLC. (whose former corporate name was British-American Tobacco Co., PLC.), acting at the benefit, instruction and behest of B.A.T. Industries PLC., entered into a contract with "La Fundacion Del Nino" (Children's Foundation)

of Caracas, Venezuela which provided, *inter alia*, that the two subsidiaries would make periodic "donations" to the Children's Foundation totalling approximately $12.5 million, in exchange for: (1) price controls on tobacco produced by the growers in Venezuela; (2) no price controls on the retail prices the tobacco companies charge for cigarettes; (3) the allowance of the "donations" as deductions from the gross income of the tobacco companies; and, (4) an agreement that the present tax rates on the tobacco companies shall remain the same. The contract was signed by Mrs. Betty Urdaneta De Herrera Campins, the president of the Children's Foundation and the wife of the then president of Venezuela; Dr. Jose Antonio Cordido Freztes, president of CATANA, and a member of the Board of Directors of Phillip Morris, Incorporated. Mr. Pedro Mumez De Caceres, general director of CATANA also signed for CATANA. Copies of the said contract in Spanish and English are attached hereto, along with two letters from the United States Department of Justice explaining the significance of the contracts.

10. Transactions similar to the one described in paragraph 9, above, have occurred between the aforementioned tobacco companies and the countries of Argentina, Mexico, Brazil, Venezuela, Nicaragua, Costa Rica and perhaps other nations both before and after May 14, 1982. Because the conduct complained about herein by the Plaintiffs involved continuing overt acts and continuous violations of the United States antitrust laws by the Defendants, and because the Defendants' conduct was intended to, and did, conceal the facts upon which the Plaintiffs base their complaint or deceived them into believing that they had no complaint, or by reason of the fraudulent nature of the conduct it was inherently self-concealing, Plaintiffs complain about, and allege damages from, the aforesaid similar conduct in Argentina, Mexico, Brazil, Nicaragua, Costa

Rica and otherwise in Venezuela, and other countries presently unknown to the Plaintiffs.

11. The aforesaid "donations" were not, in fact donations at all, but were illegal and unlawful inducements to certain foreign officials designated to unlawfully restrain interstate trade and commerce for the benefit of the Defendants, and to the detriment of the Plaintiffs and their class.

12. By the executing of the contracts described in paragraphs 9 and 10, above, the Defendants, and each of them, have knowingly and unlawfully combined, conspired, and agreed to restrain interstate trade and commerce in violation of the jurisdictional statutes mentioned in paragraph 1 of this complaint. It was part of said combination, conspiracy, and agreement, and an object and purpose thereof, to accomplish, *inter alia*, the following:

(a) arbitrarily, unlawfully, unreasonably and knowingly to lower, fix, control, set, stabilize and otherwise affect the price paid by Defendant companies for tobacco;

(b) to establish and maintain unreasonably high, excessive, monopolistic and noncompetitive retail prices for cigarettes and other tobacco products;

(c) arbitrarily, unlawfully, unreasonably and knowingly to prevent, suppress, and eliminate competition from any source in the purchase, sale, borkering [sic] or processing of tobacco;

(d) to agree upon uniform and identical and unreasonably low prices and wages to be paid to the foreign producers of tobacco;

(e) to establish and maintain unreasonably low, monopolistic and noncompetitive tax rates peculiar to themselves for their enterprises in the production, purchase, sale and brokering of tobacco products.

13. The aforesaid combination and conspiracy has had the following effect, among others:

(a) Prices paid for American or domestic tobacco have been lowered, fixed, stabilized, and maintained at an artificial and noncompetitive level;

(b) Price competition in the sale of American or domestic tobacco has been lowered, fixed, stabilized and maintained at an artificial and noncompetitive level;

(c) Sellers of tobacco including the Plaintiffs have been denied or have been impeded in obtaining the benefits of zealous brokering of tobacco at competitive terms.

14. As a result of the said combination, conspiracy and agreement, the Defendant companies have received, and are receiving, from the foreign nations mentioned herein above in paragraphs 8 and 10, tobacco in competition with tobacco produced by the Plaintiffs and their class at prices unlawfully lowered, fixed, controlled, set, stabilized and affected as aforesaid, which prices are unreasonably low. The reasonable prices for which the said tobacco produced by Plaintiffs and their class under natural and free competitive conditions would have been substantially more than the amounts which were, in fact, paid to them for such tobacco.

15. The Defendant, Phillip Morris, Incorporated is a Virginia corporation transacting business in the Eastern Federal Judicial District of Kentucky and is otherwise subject to the jurisdiction of courts in Kentucky pursuant to KRS 454.210 and has designated as agent for service of process in all of Kentucky CT Corporations System, Kentucky Home Life Building, Louisville, Kentucky 40202. Summons should therefore be served upon this Defendant by service upon the said designated process agent.

The Defendant, B.A.T. Industries PLC. (whose former corporate name was British-American Tobacco Co. PLC.) is an English corporation transacting business in the Eastern Federal Judicial District of Kentucky and is otherwise subject to the jurisdiction of courts in Kentucky pursuant to KRS 454.210 and has no agent for service of process in Kentucky known to the Plaintiffs, and summons should therefore be served upon this Defendant by service upon the Secretary of State of the Commonwealth, at Frankfort, Kentucky, pursuant to KRS 454.210 or pursuant to FRCP 4(d), (e), or (i). The last known corporate address of B.A.T. Industries PLC. is believed to be:

Windsor House
50 Victoria Station
London, England
SW1H0NL

16. As a result of the said combination, conspiracy, and agreement, the named Plaintiffs, and the class they represent, on behalf of whom this suit has been brought, have suffered damage and injury to their property, in an amount which is yet unknown to the Plaintiffs, but which the named Plaintiffs believe to be in excess of TWENTY MILLION ($20,000,000.00) DOLLARS. The named Plaintiffs, and the class they represent, on whose behalf this suit has been brought are accordingly entitled, under the provisions of 15 USC § 15 and other applicable law, to treble damages in an amount which is not yet ascertained, but which Plaintiffs believe in is excess of SIXTY MILLION ($60,000,000.00) DOLLARS. Plaintiffs are further entitled as follows: (1) to recover reasonable attorneys' fees for the services of their attorneys in this proceeding, together with their costs of suit; (2) to an injunction forbidding the Defendants from continuing to similarly contract in conspiracy to restrain trade; and (3) an order

closing the Panama Canal to the use of the Defendants pursuant to the Clayton Act, an [sic] amended, 15 USC § 31.

WHEREFORE, The Plaintiffs, Billy Lamb, Carmon Willis, and Katherine Graddy, for themselves and the class they represent, on behalf of whom this suit has been brought, pray:

1. That this Court adjudge and decree that the named Defendants have engaged in an unlawful combination and conspiracy in restraint of trade and commerce in the purchase, sale, production and brokering of tobacco and tobacco products to the damage of Plaintiffs and their class;

2. That judgment be entered against the Defendants, and each of them, by virtue of said combination and conspiracy in violation of the Sherman Act, the Clayton Act, and the Robinson-Patman Act in favor of the Plaintiffs and their class, for damages in the amount of SIXTY MILLION ($60,000,000.00) DOLLARS, or according to proof adduced at trial;

3. For an order enjoining and restraining the Defendants from unlawfully acting as described herein under any contract named herein or any similar contract;

4. For reasonable counsel fees and the costs of this action;

5. For an order closing the Panama Canal to the Defendants as violators of the Clayton Act pursuant to 15 USC § 31.

6. For an order determining that this cause may be taken as a class action, that the Plaintiffs may represent the class, and such other order pursuant to FRCP 23 as may be appropriate.

7. For such other and further relief as the case may require, the facts demand, and the Court may deem just and proper under the circumstances.

Dated this the 21 day of August, 1985.

(s) John F. Lackey
JOHN F. LACKEY
LACKEY & LACKEY, ATTORNEYS
142 North Second Street
Richmond, KY 40475

ATTORNEY FOR PLAINTIFFS
AND THEIR CLASS

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF KENTUCKY
AT LEXINGTON

Civil Actien No. 85-340

BILLY LAMB, Et Al., - - - - *Plaintiffs,*

v.

PHILLIP MORRIS INCORPORATED,
Et Al., - - - - - - - - - *Defendants.*

MOTION TO AMEND COMPLAINT AND FOR LEAVE TO FILE REPLY MEMORANDUM IN EXCESS OF FIVE PAGES

I. Come the plaintiffs, through counsel, and respectfully move the court, pursuant to Rule 15 of the Federal Rules of Civil Procedure, and for the reasons set forth, in the accompanying memorandum, for leave to amend their original complaint as follows:

1. In paragraph 1 of said complaint before the period in the first sentence thereof to add the words" ,and the Foreign Corrupt Practices Act of 1977 (15 USC s 78 dd-1 and 78 dd-2)."

2. In paragraph 13 of said complaint after subparagraph (c) add this additional sub-paragraph to read "(d) Plaintiffs and their class have been unable to sell all or substantially all of their tobacco crops for several years except to the Burley Tobacco Cooperative or "pool", which phenomenon has tended to destroy the lawful pattern of marketing burley tobacco and has partially created such

tremendous surpluses of burley tobacco as to imperil the future production of burley tobacco in Kentucky and elsewhere in the United States, and to prevent its export to customary nations which had heretofore purchased the crops of plaintiffs and their class."

3. In paragraph 14 of said complaint to add an additional sentence after the present end thereof to read "Such conduct had a direct, substantial and reasonably forseeable effect on commerce of the United States."

II. Plaintiffs further move for leave to file a reply memorandum to defendant Phillip Morris Incorporated's memorandum of thirty six (36) pages in excess of five (5) pages, but not greater than forty (40) pages.

(s) John F. Lackey
JOHN F. LACKEY
Attorney for Plaintiffs
142 North Second Street
Richmond, Kentucky 40475

NOTICE OF MOTION

PLEASE TAKE NOTICE that the foregoing Motion will be brought on for hearing before the Honorable Scott Reed, Judge, U.S. District Court, at the U.S. District Courthouse, Federal Building, Barr Street, Lexington, Kentucky, or such other location as the Court may assign, same to be heard at the convenience of the Court.

(s) John F. Lackey
JOHN F. LACKEY
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I, the undersigned attorney for plaintiffs, do hereby certify that a true and correct copy of the foregoing Motion was mailed this 1st day of November, 1985, to Hon. Robert M. Watt III, STOLL, KEENON and PARK, 1000 First Security Plaza, Lexington, Kentucky 40507 and to Hon. Abe Krash, Robert Weiner and Philip Horton, ARNOLD & PORTER, 1200 New Hampshire Avenue, N.W., Washington, D.C. 20036, Attorneys for Phillip Morris Incorporated, and to Hon. James Park, Jr., BROWN, TODD and HEYBURN, 1100 Vine Center, Lexington, Kentucky 40507, Attorney for defendant, B.A.T. Industries, PLC

(s) John F. Lackey
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF KENTUCKY
AT LEXINGTON

Civil Action No. 85-340

BILLY LAMB, *Et Al.*, - - - - - - *Plaintiffs,*

v.

PHILLIP MORRIS INCORPORATED,
Et Al., - - - - - - - - *Defendants.*

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO AMEND COMPLAINT AND TO FILE MORE LENGTHY MEMORANDUM

---

1. By way of introduction let us first observe that plaintiffs believe they are entitled to amend their pleading pursuant to FRCP 15 at this time as a matter of right. Defendant, Phillip Morris Incorporated's (hereinafter PMI) motion to dismiss was not filed in conformity with Rule 7 of the Rules of the United States District Court of the Eastern District of Kentucky in that it exceeded fifteen (15) pages without conformity with the requirements of Ky. Civ. R. 76.12 (c) and (d) (1984). Had the additional matters required by such rules been appended to the said memorandum it would probably have exceeded the forty (40) page maximum permitted without leave of court. For such reason PMI is now technically in default and plaintiffs' amendment is "filed before a representative pleading is served".

However, plaintiffs, out of an abundance of caution, seek leave of court for their amendment, which Rule 15 says "shall be freely given."

The two minor requested amendments merely set forth additional jurisdictional authority granted or, perhaps, mandated by the United States Code in an action such as the instant case. No prejudice will result to either defendant by the granting of the amendment at this early stage of the lawsuit.

2. Plaintiffs, also out of an abundance of caution, move for leave to file a Reply Memorandum to defendant PMI's Memorandum dated October 16, 1985, of thirty-six (36) pages. Suffice it say in support of this motion that plaintiffs cannot even begin to answer defendant's authority within the five (5) pages authorized for reply briefs under local rule 7(b). Leave is requested to file a response not to exceed forty (40) pages, and including the additional matters required by the said local rule.

Respectfully submitted,

(s) John F. Lackey
ATTORNEY FOR PLAINTIFFS

COMPLAINT PARA. 9, EXHIBIT

LETTER DATED SEPTEMBER 28, 1983

Mr. John M. Fedders
Director, Division of Enforcement
Securities and Exchange Commission
Room 4000, 450 5th Street, N.W.
Washington, D.C. 20549

Attn: Gary Lynch

Re: Phillip Morris Tobacco Company, et al

Dear Mr. Fedders:

The Section received an investigative report indicating a subsidiary of Phillip Morris and a subsidiary of the British American Tobacco Company entered into a contract with the Children's Fund Foundation of Venezuela which raised some concern about a possible violation of the Foreign Corrupt Practices Act.

The contract provides that the two subsidiaries will make periodic "donations" to the Children's Fund Foundation, apparently a private charitable organization, totaling approximately 12.5 million dollars, in exchange for price controls on tobacco purchased from the growers in Venezuela, no price controls on the retail prices the tobacco companies charge for cigarettes, the amount of the "donations" must be allowable as deductions from the gross income of the tobacco companies, and the present tax rates are to remain the same. The wife of the President of Venezuela is the President of the Foundation. Apparently, similar transactions have occurred in Argentina, Mexico, Brazil and Costa Rica.

We have declined to consider the matter for investigation inasmuch as it lacks any evidence of a payment to a

foreign official. However, the transaction is unusual enough in our experience to bring the matter to your attention. Enclosed is a copy of the contract for whatever consideration and use of the Commission.

Sincerely,

Robert W. Ogren
Chief, Fraud Section
Criminal Division

By:

James J. Graham
Deputy Chief, Fraud Section

Enclosure

Foreign Corrupt Practices Act of 1977
91 Stat. 1494

PUBLIC LAW 95-213

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

TITLE I—FOREIGN CORRUPT PRACTICES

SHORT TITLE

SEC. 101. This title may be cited as the "Foreign Corrupt Practices Act of 1977".

ACCOUNTING STANDARDS

SEC. 102. Section 13(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78q(b)) is amended by inserting "(1)" after "(b)" and by adding at the end thereof the following:

"(2) Every issuer which has a class of securities registered pursuant to section 12 of this title and every issuer which is required to file reports pursuant to section 15(d) of this title shall—

"(A) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and

"(B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that—

"(i) transactions are executed in accordance with management's general or specific authorization;

"(ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;

"(iii) access to assets is permitted only in accordance with management's general or specific authorization; and

"(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

"(3)(A) With respect to matters concerning the national security of the United States, no duty or liability under paragraph (2) of this subsection shall be imposed upon any person acting in cooperation with the head of any Federal department or agency responsible for such matters if such act in cooperation with such head of a department or agency was done upon the specific, written directive of the head of such department or agency pursuant to Presidential authority to issue such directives. Each directive issued under this paragraph shall set forth the specific facts and circumstances with respect to which the provisions of this paragraph are to be invoked. Each such directive shall, unless renewed in writing, expire one year after the date of issuance.

"(B) Each head of a Federal department or agency of the United States who issues a directive pursuant to this paragraph shall maintain a complete file of all such directives and shall, on October 1 of each year, transmit a summary of matters covered by such directives in force at any time during the previous year to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate".

FOREIGN CORRUPT PRACTICES BY ISSUERS

SEC. 103. (a) The Securities Exchange Act of 1934 is amended by inserting after section 30 the following new section:

"FOREIGN CORRUPT PRACTICES BY ISSUERS

"SEC. 30A. (a) It shall be unlawful for any issuer which has a class of securities registered pursuant to section 12 of this title or which is required to file reports under section 15(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—

"(1) any foreign official for purposes of—

"(A) influencing any act or decision of such foreign official in his official capacity, including a decision to fail to perform his official functions; or

"(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentalilty,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person;

"(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of—

"(A) influencing any act or decision of such party, official, or candidate in its or his official capacity, including a decision to fail to perform its or his official functions; or

"(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality.

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person; or

"(3) any person, while knowing or having reason to know that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of—

"(A) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, including a decision to fail to perform his or its official functions; or

"(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.

"(b) As used in this section, the term 'foreign official' means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of such government or department, agency, or instrumentality. Such term does not include any employee of a foreign government or any department, agency, or instrumentality thereof whose duties are essentially ministerial or clerical.".

(b)(1) Section 32(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78ff(a)) is amended by inserting "(other than section 30A)" immediately after "title" the first place it appears.

(2) Section 32 of the Securities Exchange Act of 1934 (15 U.S.C. 78ff) is amended by adding at the end thereof the following new subsection:

"(c)(1) Any issuer which violates section 30A(a) of this title shall, upon conviction, be fined not more than $1,000,000.

"(2) Any officer or director of an issuer, or any stockholder acting on behalf of such issuer, who willfully violates section 30A(a) of this title shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years, or both.

"(3) Whenever an issuer is found to have violated section 30A(a) of this title, any employee or agent of such issuer who is a United States citizen, national, or resident or is otherwise subject to the jurisdiction of the United States (other than an officer, director, or stockholder of such issuer), and who willfully carried out the act or practice constituting such violation shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years, or both.

"(4) Whenever a fine is imposed under paragragh (2) or (3) of this subsection upon any officer, director, stockholder, employee, or agent of an issuer, such fine shall not be paid, directly or indirectly, by such issuer.".

FOREIGN CORRUPT PRACTICES BY DOMESTIC CONCERNS

SEC. 104. (a) It shall be unlawful for any domestic concern, other than an issuer which is subject to section 30A of the Securities Exchange Act of 1934, or any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an

offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—

(1) any foreign official for purposes of—

(A) influencing any act or decision of such foreign official in his official capacity, including a decision to fail to perform his official functions; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of—

(A) influencing any act or decision of such party, official, or candidate in its or his official capacity, including a decision to fail to perform its or his official functions; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person; or

(3) any person, while knowing or having reason to know that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political

party or official thereof, or to any candidate for foreign political office, for purposes of—

(A) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, including a decision to fail to perform his or its official functions; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person.

(b)(1)(A) Except as provided in subparagraph (B), any domestic concern which violates subsection (a) shall, upon conviction, be fined not more than $1,000,000.

(B) Any individual who is a domestic concern and who willfully violates subsection (a) shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years, or both.

(2) Any officer or director of a domestic concern, or stockholder acting on behalf of such domestic concern, who willfully violates subsection (a) shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years, or both.

(3) Whenever a domestic concern is found to have violated subsection (a) of this section, any employee or agent of such domestic concern who is a United States citizen, national, or resident or is otherwise subject to the jurisdiction of the United States (other than an officer, director, or stockholder acting on behalf of such domestic concern), and who willfully carried out the act or practice constituting

such violation shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years, or both.

(4) Whenever a fine is imposed under paragraph (2) or (3) of this subsection upon any officer, director, stockholder, employee, or agent of a domestic concern, such fine shall not be paid, directly or indirectly, by such domestic concern.

(c) Whenever it appears to the Attorney General that any domestic concern, or officer, director, employee, agent, or stockholder thereof, is engaged, or it about to engage, in any act or practice constituting a violation of subsection (a) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing a permanent or temporary injunction or a temporary restraining order shall be granted without bond.

(d) As used in this section:

(1) The term "domestic concern" means (A) any individual who is a citizen, national, or resident of the United States; or (B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

(2) The term "foreign official" means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality. Such term does not include any employee of a foreign government or any department, agency, or instrumen-

tality thereof whose duties are essentially ministerial or clerical.

(3) The term "interstate commerce" means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof. Such term includes the intrastate use of (A) a telephone or other interstate means of communication, or (B) any other interstate instrumentality.

TITLE II—DISCLOSURE

SEC. 201. This title may be cited as the "Domestic and Foreign Investment Improved Disclosure Act of 1977".

SEC. 202. Section 13(d)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78m) is amended to read as follows:

"(d)(1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 12 of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 12(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, is directly or indirectly the beneficial owner or more than 5 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations, prescribe as necessary or appropriate in the public interest or for the protection of investors—

"(A) the background, and identity, residence, and citizenship of, and the nature of such beneficial ownership by, such person and all other persons by whom or on whose behalf the purchases have been or are to be effected;

"(B) the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank, as defined in section 3(a)(6) of this title, if the person filing such statement so requests, the name of the bank shall not be made available to the public;

"(C) if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure;

"(D) the number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, directly or indirectly, by (i) such person, and (ii) by each associate of such person, giving the background, identity, residence, and citizenship of each such associate; and

"(E) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures, loan or

option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof.".

SEC. 203. Section 13 of the Securities Exchange Act of 1934, as amended (15 U.S.C. 78m), is amended by adding at the end thereof the following new subsection:

"(g)(1) Any person who is directly or indirectly the beneficial owner of more than 5 per centum of any security of a class described in subsection (d)(1) of this section shall send to the issuer of the security and shall file with the Commission a statement setting forth, in such form and at such time as the Commission may, by rule, prescribe—

"(A) such person's identity, residence, and citizenship; and

"(B) the number and description of the shares in which such person has an interest and the nature of such interest.

"(2) If any material change occurs in the facts set forth in the statement sent to the issuer and filed with the Commission, an amendment shall be transmitted to the issuer and shall be filed with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

"(3) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a 'person' for the purposes of this subsection.

"(4) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

"(5) In exercising its authority under this subsection, the Commission shall take such steps as it deems necessary or appropriate in the public interest or for the protection of investors (A) to achieve centralized reporting of information regarding ownership, (B) to avoid unnecessarily duplicative reporting by and minimize the compliance burden on persons required to report, and (C) to tabulate and promptly make available the information contained in any report filed pursuant to this subsection in a manner which will, in the view of the Commission, maximize the usefulness of the information to other Federal and State agencies and the public.

"(6) The Commission may, by rule or order, exempt, in whole or in part, any person or class of persons from any or all of the reporting requirements of this subsection as it deems necessary or appropriate in the public interest or for the protection of investors.

"(h) The Commission shall report to the Congress within thirty months of the date of enactment of this subsection with respect to (1) the effectiveness of the ownership reporting requirements contained in this title, and (2) the desirability and the feasibility of reducing or otherwise modifying the 5 per centum threshold used in subsections (d)(1) and (g)(1) of this section, giving appropriate consideration to—

"(A) the incidence of avoidance of reporting by beneficial owners using multiple holders of record;

"(B) the cost of compliance to persons required to report;

"(C) the cost to issuers and others of processing and disseminating the reported information;

"(D) the effect of such action on the securities markets, including the system for the clearance and settlement of securities transactions;

"(E) the benefits to investors and to the public;

"(F) any bona fide interests of individuals in the privacy of their financial affairs;

"(G) the extent to which such reported information gives or would give any person an undue advantage in connection with activities subject to sections 13(d) and 14(d) of this title;

"(H) the need for such information in connection with the administration and enforcement of this title; and

"(I) such other matters as the Commission may deem relevant, including the information obtained pursuant to section 13(f) of this title."

SEC. 204. Section 15(d) of the Securities Exchange Act of 1934 is amended by inserting immediately before the last sentence the following new sentence: "The Commission may, for the purpose of this subsection, define by rules and regulations the term 'held of record' as it deems necessary or appropriate in the public interest or for the protection of investors in order to prevent circumvention of the provisions of this subsection."

Approved December 19, 1977.

Title IV—Foreign Trade Antitrust Improvements
96 Stat. 1246

PUBLIC LAW 97-290

SHORT TITLE

SEC. 401. This title may be cited as the "Foreign Trade Antitrust Improvements Act of 1982".

AMENDMENT TO SHERMAN ACT

SEC. 402. The Sherman Act (15 U.S.C. 1 et seq.) is amended by inserting after section 6 the following new section:

"SEC. 7. This Act shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

"(1) such conduct has a direct, substantial, and reasonably foreseeable effect —

"(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

"(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

"(2) such effect gives rise to a claim under the provisions of this Act, other than this section.

If this Act applies to such conduct only because of the operation of paragraph (1)(B), then this Act shall apply to such conduct only for injury to export business in the United States."

Approved October 8, 1982.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
AT LEXINGTON

Lexington Civil No. 85-340

BILLY LAMB, CARMON WILLIS,
KATERINE [sic] GRADDY

v.

PHILLIP MORRIS, INCORPORATED
B.A.T. INDUSTRIES PLC.

TRANSCRIPT OF HEARING—MOTION TO COMPEL BEFORE THE HONORABLE SCOTT REED.

Lexington, Kentucky, May 7, 1987, 1:30 P.M.
Page 25:

---

* * *

THE COURT:

The matter of jurisdiction concerns me and particularly that portion of the showing so far as goes to subject matter jurisdiction. In view of what we have before us and what we have been dealing with sporadically, I'm going to at this point state that the motion of the defendant Phillip Morris to stay discovery and the motion of the defendant B.A.T. for a protective order are hereby granted. Discovery in this matter is hereby stayed until resolution of the pending motion to dismiss. Plaintiffs motion to compel answers to plaintiffs interrogatories is hereby denied without prejudice. That will put the record in shape and I will immediately address myself to the motion to dismiss. And, Mr. Lackey, I can't make any hard commit-

ments, but I am going to make every attempt to move this motion to dismiss up and address myself to it as reasonably prompt as human frailty [sic] will permit me, and I can't give you any more exact proposition, but you are entitled to a decision. And certainly I think that this matter of subject matter jurisdiction is a critical point at which to seriously examine this lawsuit now.

THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Civil Action Number 85-340

BILLY LAMB, CARMON WILLIS,
and KATHERINE GRADDY - - - - *Plaintiffs*
on behalf of themselves and
as representatives of the
class defined herein

v.

PHILLIP MORRIS, INCORPORATED
and B.A.T INDUSTRIES P.L.C. - - *Defendants*

AFFIDAVIT

I, Ian Malcolm MacInnes of Windsor House, 50 Victoria Street, London SW 1 make oath and say as follows:—

1. I am the secretary of B.A.T Industries p.l.c. ("B.A.T Industries") and I reside in London, England. I have personal knowledge of the facts contained in this affidavit, and I have read the complaint in this action.

2. B.A.T Industries is a public limited company organised under the Companies Acts of the United Kingdom. B.A.T Industries' registered office is at Windsor House, 50 Victoria Street, London SW1H ONL, England.

3. During the period relevant to the complaint:
(a) B.A.T Industries has never manufactured or sold any goods or products, including tobacco, anywhere in

the United State of America, including the Commonwealth of Kentucky and the Eastern District thereof;

(b) B.A.T Industries has never purchased any tobacco anywhere in the United States of America, including the Commonwealth of Kentucky and the Eastern District thereof;

(c) B.A.T Industries has never maintained any office or place of business in the United States of America, including the Commonwealth of Kentucky and the Eastern District thereof;

(d) B.A.T Industries has never owned or possessed any real estate or any personal property of any kind located within the United States of America, including the Commonwealth of Kentucky and the Eastern District thereof;

(e) B.A.T Industries has not maintained a bank account or a telephone listing anywhere within the United States of America, including the Commonwealth of Kentucky and the Eastern District thereof;

(f) B.A.T Industries has never had any officers or employees who have been employed on a regular basis anywhere in the United States of America, including the Commonwealth of Kentucky and the Eastern District thereof;

(g) B.A.T Industries does not pay any taxes to the United States or America or any political subdivision thereof, including the Commonwealth of Kentucky.

4. During the period relevant to the complaint, B.A.T Industries has invested in the shares of numerous corporations throughout the world, either directly or through subsidiaries of B.A.T Industries, including corporations based in the United States of America. From time to time, officers, directors and other agents and employees of B.A.T Industries ("B.A.T Industries Officials") make

temporary visits to the United States of America, including the Western District of Kentucky, for the purpose of maintaining liaison with the United States subsidiaries. During such temporary visits, B.A.T Industries officials do not assume the day-to-day management of the internal affairs of any United States subsidiary. The acts complained of in the complaint in this proceeding are completely unrelated to such temporary visits by B.A.T Industries officials to B.A.T Industries' United States subsidiaries. The claim attempted to be set forth in the complaint does not arise out of any contact by B.A.T Industries with the United States of America, including the Commonwealth of Kentucky.

5. None of the ordinary shares issued by B.A.T Industries are bought or sold on any market within the United States of America, and no securities issued by B.A.T Industries are registered under the United States federal securities laws. So far as I am aware only American Depository Receipts ("ADRs"), representing ordinary shares of B.A.T Industries deposited with the Morgan Guaranty Trust Company of New York, Irving Trust Company, Citibank and Bank of New York, are traded on the American stock exchange. B.A.T Industries was not a party to any registration statement respecting the ADRs filed with the Securities and Exchange Commission, and B.A.T Industries was not the issuer of the ADRs under United States federal securities laws and regulations. B.A.T Industries reimburses one of its United States subsidiaries for expenses incurred in furnishing information in the name of B.A.T Industries to the United States financial community relevant to the ADRs concerning B.A.T Industries and its holdings.

(s) I. M. MacInnes

Sworn at Windsor House
50 Victoria Street
in the City of Westminster
this 18th day of October 1985
before me

(s) J. R. Williams
Solicitor

THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Civil Action Number 85-340

BILLY LAMB, CARMON WILLIS,
and KATHERINE GRADDY - - - - *Plaintiffs*
on behalf of themselves and
as representatives of the
class defined herein

v.

PHILLIP MORRIS, INCORPORATED
and B.A.T. INDUSTRIES P.L.C. - - - *Defendants*

AFFIDAVIT

Peter Rombaut, being duly sworn, states and deposes as follows:—

1. I am Peter John Rombaut, and I presently reside at Quinta Araguaney, Calle Santa Anna, El Pedregal del Country Club, Caracas, Venezuela.
2. I am now employed as President and General Manager of C.A. Cigarerra Bigott, Sucs. (hereinafter "Bigott"), in Los Ruices, Caracas, Venezuela, and I have been employed by Bigott since October 1980. I am in the United Kingdom on a temporary visit.
3. I have personal knowledge of the facts contained in this affidavit, and I have read the complaint in this proceeding.

4. Bigott is a corporation organised and existing under the laws of the Republic of Venezuela. All of the issued and outstanding capital stock of Bigott is held for the benefit of B.A.T Industries p.l.c. ("B.A.T Industries") through one or more subsidiaries of B.A.T Industries, all of which subsidiaries are organised under the Companies Acts of the United Kingdom.
5. Although from time to time Bigott has liaison with and guidance from its parent company in London, the management of the day-to-day affairs of Bigott is conducted in Venezuela by the Board of Directors and officers of Bigott.
6. During the period relevant to the complaint, all Venezuelan domestic tobacco purchased by Bigott was processed and manufactured in Venezuela into finished tobacco products. During the period relevant to this complaint, Bigott exported no unmanufactured Venezuelan tobacco.
7. During the period 1974 to July 1979, the price paid by Bigott for unmanufactured Venezuelan tobacco was fixed by the Venezuelan government. From July 1979 to the present, the price paid by Bigott for such tobacco was fixed by contracts negotiated with Associacion Venezolana de Cultivadores de Tabaco (The Venezuelan Association of Tobacco Growers) (hereinafter referred to as the "tobacco producers cooperative"). The price at which finished cigarettes could be sold in Venezuela was regulated and controlled by the Venezuelan government until September 1979 and during the period July 1981 through April 1982. The Venezuelan government levied a tax on the manufacture of cigarettes.
8. For most of the time relevant to the complaint, the price paid the Venezuelan tobacco producers cooperative exceeded the price paid for similar grades of Ameri-

can burley tobacco. The average price paid the Venezuelan tobacco producers exceeded US $2.00 per pound. This situation existed until the Venezuelan bolivar was devalued in February 1983.

9. At all times relevant to the complaint, the importation into Venezuela of unmanufactured tobacco, including American tobacco, was controlled by the Venezuelan government. During this period, Bigott imported no American tobacco into Venezeula.

10. During the period 1979 to 1982, the tobacco producers cooperative solicited substantial donations from Bigott to an independent Venezuelan charitable foundation unrelated to Bigott, La Fundacion del Nino (the "Children's Foundation"). The purpose of the proposed donations was the protection and social development of infants, children and the family, especially of the rural population which live or work in the tobacco producing regions of Venezuela. The donations were to be earmarked for teaching, cultural, sports and medical assistance programmes. The Children's Foundation is a national charity involved for many years in the domestic, cultural and social affairs of Venezuela. By tradition, the wife of the president of Venezuela serves as President of the Children's Foundation. With any change of administration in the government of Venezuela, there has been a corresponding change in the presidency of the Children's Foundation.

11. Bigott was willing to make the substantial donations to the Children's Foundation requested by the tobacco producers cooperative if economic circumstances within Venezuela allowed Bigott to have funds available to do so. During the period relevant to the complaint:

(a) The costs incurred by Bigott in the tobacco business escalated, because of the impact of substantial inflation on the Venezuelan economy;

(b) The prices paid by Bigott to the Venezuelan tobacco producers cooperative exceeded rises in the Venezuelan Central Bank cost of living index;

(c) The excise tax imposed by the Venezuelan government on cigarettes was increased;

(d) The Venezuelan government from time to time controlled the actual price at which Bigott could sell its cigarettes, and the price increases permitted by this government were not enough to offset Bigott's increased costs.

12. Unless economic circumstances permitted Bigott to operate at an acceptable profit, Bigott would not be able to make the donations to the Children's Foundation requested by the tobacco producers cooperative. Therefore, Bigott's agreement to make the donations was made subject to four conditions affecting Bigott's ability to make the donations, namely:

(a) The donations would be deductible for the purpose of determining Bigott's net taxable income;

(b) The existing contracts with the tobacco producers cooperative would be maintained;

(c) The retail price of cigarettes would no longer be controlled; and

(d) The current rate of taxation on manufacture and sale of cigarettes would be maintained.

13. Bigott's agreement in 1982 to make donations to the Children's Foundation was widely publicised throughout Venezuela, both in the national press and on television.

Further the affiant saith not.

(s) P. Rombaut

Sworn at Windsor House
50 Victoria Street
in the City of Westminster
this 25th day of October 1985
before me

(s) J. R. Williams
Solicitor

UNITED STATES DEPARTMENT OF AGRICULTURE
FOREIGN AGRICULTURE CIRCULAR
TOBACCO
WORLD TOBACCO SITUATION

[Table from Photocopy]

TABLE 11: TOBACCO, UNMANUFACTURED: U.S. CALENDAR YEAR IMPORTS FOR CONSUMPTION BY TYPE AND COUNTRY OF ORIGIN, AVERAGE 1977-81, ANNUAL 1982-84

COMMODITY AND COUNTRY OF ORIGIN	QUANTITY (IN METRIC TONS)				VALUE (IN THOUSANDS OF DOLLARS)			
	5-Year Avg. 1977-1981	1982	1983	1984	5-Year Avg. 1977-1981	1982	1983	1984
BURLEY								
VENEZUELA	37	0	0	0	33	2	0	0

KENTUCKY DEPARTMENT OF AGRICULTURE
KENTUCKY TOBACCO MARKET
'83 - '84 Report and Review
'84 - '85 Marketing Preview
[Table from Photocopy]

BURLEY TOBACCO
PRODUCTION, VALUE & SEASON AVERAGE
EIGHT STATE BURLEY BELT
1968 - 1983

CROP	PRODUCTION	VALUE	AVERAGE PRICE	CROP	PRODUCTION	VALUE	AVERAGE PRICE
	(000 Lbs.)	($000)	(¢ Per Lb.)		(000 Lbs.)	($000)	(¢ Per Lb.)
1968	563,367	415,133	73.7	1976	678,976	774,998	114.1
1969	591,395	411,564	69.6	1977	617,280	740,626	120.0
1970	560,545	404,919	72.2	1978	626,273	821,705	131.2
1971	472,576	382,421	80.9	1979	445,822	647,334	145.2
1972	601,006	476,228	79.2	1980	560,816	930,394	165.9
1973	450,416	418,335	92.9	1981	729,752	1,318,662	180.7
1974	612,649	696,590	113.7	1982	821,918	1,487,672	181.0
1975	639,056	674,448	105.5	1983	481,439	853,591	177.3